

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

76-7293

To be argued by
ARTHUR M. BOAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD IMANUEL,

Plaintiff,

-against-

LYKES BROS. STEAMSHIP CO. INC.,

Defendant and Third-Party
Plaintiff-Appellant,

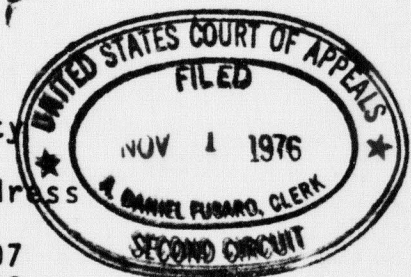
-against-

TODD SHIPYARDS CORPORATION,

Third-Party Defendant-Appellee.

APPELLANT'S REPLY BRIEF

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NATURE OF CONTENTS

	Page
Statement of Facts	1
Appellee's Factual Contentions	2
a. Elevator Cables	2
b. The Operation of the Lift by Imanuel and Haag	5
Argument	
<u>Point I</u> The Facts submitted to the Trial Court require the Inference that Todd damaged the cables in the course of moving the manifolds and other objects through the shaft without providing protection for the cables or using a tag line	6
<u>Point II</u> Todd's failure to call any witnesses must be considered together with their making false answers to interrogatories	9
<u>Point III</u> The Documents attached to the Appellee's Brief marked "Special Exhibit 1" and "Special Exhibit 2" are not Exhibits and contain misleading and erroneous information	12
Conclusion	13

TABLE OF CITATIONS

	Page
U.S.Department of Labor Safety Regulations for Ship Repairing, Section 1501.66	2
Fernandez vs. Chios Shipping Co. Ltd. (Docket #75-7465)	9

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APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

The single and central fact to this case is that Leonard Imanuel was injured when two elevator cables parted. Both cables broke at the same point. (139a). Both breaks were

caused by impact damage and the consequent weakening of the cables. (293a).

Before Todd worked on the vessel, Imanuel had run his hand along the full length of the cables as he greased them. (78a, 69a-71a, 112a) Todd had used the elevator shaft as a hoistway for the lowering and raising of heavy objects. Todd had not used approved safety measures to protect the vessel and the elevator cables. (See U.S. Department of Labor Safety Regulations for Ship Repairing, Section 1501.66). Todd produced no witnesses to rebut the natural inferences.

There is much speculation in the brief filed on behalf of the Appellee to the effect that contact between the elevator car and the wall sheave, or pulley, in some manner severed the cables. This speculation is contradicted by the record. (166a, 187a).

APPELLEE'S FACTUAL CONTENTIONS

a. ELEVATOR CABLES

The Appellee, in its Statement of Facts, on pages 3 and 4 states that when Imanuel and Haag rode the elevator on December 10th

"Nothing was wrong with the cables".

This bald statement has no support in the record and is contradicted by the occurrence of the accident. It is, of course, true that Imanuel and Haag were unaware of the damage to the cables before the accident.

On the date of the accident Imanuel and Haag were testing and checking the electrical system. They were interested only in the electrical circuits, the door locks and the limit switches. They were not testing the mechanical devices and made no examination of the cables on December 10th.

Todd argues that the damage to the twin cables occurred on December 10th and while Imanuel and Haag were at work checking the electrical circuits. This argument fails to recognize the nature of the work being performed by the two men. They were in the act of opening and inspecting the individual "limit switches". These are devices located at each level designed to stop the car when it reaches the level of the switch which is also the level of the corresponding deck. Ordinary common sense dictates that a workman inspecting limit switches from an elevator would stop the elevator below the switch rather than above it. This conclusion is based upon the fact that a person riding on a car cannot see under it.

Common sense is backed up by the testimony of the individuals involved. The elevator platform was never raised above the top limit switch.

Imanuel testified:

- Q Did you go all the way up to the top or not ?
A Not all the way, down below the level. (96a)

Haag testified on direct examination by Mr. Healey:

- Q At this point then, the car, as I understand your testimony, would be slightly lower than the ordinary stopping position at that level, is that correct ?

A Correct.

- Q How much lower ?

A Perhaps a foot or two, a foot and a half. It was just low enough where I could easily step out of it. Normally it would be flush, so I actually stepped up and over.

- Q To get onto the deck ?

A It was about a foot or 18 inches below where it should be. (123a)

There is absolutely no evidence that the cables could have been cut at this juncture. There was no failure of any electrical equipment.

On Page 10 of the Appellee's brief appears the gratuitous remark that Todd was not permitted to examine the elevator cables prior to the trial. The record below offers no support for this contention for the simple reason that it is contrary to fact.

The witnesses Brierly and Thompson examined the cables within the first four days after the accident, prior to the suit by Imanuel and prior to an awareness of Todd's involvement. During the pendency of this case Todd's counsel was given a standing invitation to examine the cables at their convenience. No interest was evidenced until the brief on appeal was written.

b. THE OPERATION OF THE LIFT BY
IMANUEL AND HAAG

The Appellee argues at pages 9 and 12 as follows:

"It was demonstrated by Todd's witness, DiCocco, with the electrical safety features eliminated, the car would have ridden above the upper limit switch level so that the sheave on the bottom of the car would contact with the shaft wall sheave and cut the cable."

* * *

"Todd suggests that the upper wall sheave and the sheave under the platform could have cut the cable. Todd suggests that if the platform were raised too high with the shaft top safety bolts removed the sheave edge above the drum on the shaft wall could have cut the cable."

This argument is easily demonstrated to be no more than that. It is enough to ask where the cables would have been cut if an incident such as Todd claims had occurred. The answer is approximately 6 to 7 feet from the bitter ends which were fastened to the shaft wall. This can be compared with the known fact that the cables were severed at a dis-

tance of greater than 16 feet from the bitter ends. The Court can satisfy itself on this question by a reference to Exhibit "F", a diagram of the platform stopped at the top of the shaft. At this position the length of cable extending from the shaft wall to the idler sheave is approximately 6 feet and the further distance around the idler shaft approximately an additional foot. It should be emphasized that these computations are with the car in a safe position at the top of the shaft. Additional raising of the car to the dangerous position referred to by the Appellee would shorten the cables and thus produce a cut, if the theory were justified, below 7 feet from the bitter ends.

In making this observation to the Court we do not mean to concede that the idler sheave could come in contact with the car sheave. We sincerely doubt that proposition. There is no testimony in the record from which to conclude that such contact is possible.

Argument.

POINT I

THE FACTS SUBMITTED TO THE TRIAL COURT REQUIRE THE INFERENCE THAT TODD DAMAGED THE CABLES IN THE COURSE OF MOVING THE MANIFOLDS AND OTHER OBJECTS THROUGH THE SHAFT WITHOUT PROVIDING PROTECTION FOR THE CABLES OR USING A TAG LINE.

In this case it was demonstrated to the Court that the entire length of cables had been examined prior to the vessel being turned over to the shipyard for repairs. The plaintiff, Imanuel, had greased the entire length of the cables by hand. We further know that on December 10, the date of the accident, the cables were in a weakened and damaged condition. In the interim Todd used the elevator shaft to lower and remove heavy objects into and from the engine room. Among these were ship's manifolds. If this work had been done in a workmanlike and seaworthy manner it would have been supervised by a flagman, the shaft would have been protected and the lifts would have been steadied by tag lines. Todd did not produce the flagman. It offered no evidence that tag lines were used. It offered no evidence that the shaft was padded or protected. This combination of evidence and lack of evidence leads to but one inference. That inference is that the cables for the engine room lift were damaged by Todd.

Todd has attempted to rebut this presumption by advancing other theories for the way in which the cables may have been damaged. None of these theories match with the objective facts.

When Todd was using the elevator shaft the loads were lowered or lifted by means of a shore based gantry crane. (See Ex.44, 310a). The end of the boom of the gantry crane was substantially above the top of the shaft, not less than 60 feet. From the end of the boom a cable extended down to a light load block. Attached to the block was a hook into which was put a sling. At the bottom end of the sling was a weight or object being raised or lowered. The block itself was never lowered into the shaft. From this fact it can be concluded that the sling must have been 50 or 60 feet in length in order to reach the bottom of the elevator shaft and that the boom had to be 50 or 60 feet above the top of the elevator shaft in order to allow the load to clear the coaming. It is easily visualized that a weight suspended at the end of a 60 to 100 foot lift will sway and carry considerable momentum, patently sufficient to damage 5/16" elevator cables. This is the only logical explanation for the damage to the cables which precipitated Imanuel's accident.

The platform was never above the limit switch. It had been stopped below the switch while Haag was on the lift. Imanuel then joined Haag on the platform and together they examined the limit switch. As Haag left to get a

meter the platform fell. The car had not been moved for some time. Imanuel had been at the controls. He left the controls, went up to the weather deck and from the weather deck stepped down to the platform joining Haag. The cables did not come off any of the sheaves. There was no possible contact of the cables with any moving object during the operation by Haag and Imanuel. The cables parted simply because they had been damaged to the extent that they could not carry the weight of the platform and two men. We again emphasize that the car was not in motion and not being moved when the cables finally parted.

Point II

TODD'S FAILURE TO CALL ANY WITNESSES MUST BE
CONSIDERED TOGETHER WITH THEIR MAKING FALSE
ANSWERS TO INTERROGATORIES

Todd's false answers to interrogatories and failure to call any fact witnesses should be considered together as a part of its determination to prevent Lykes from obtaining the facts. On this score we call the attention of this Court to its recent decision in FERNANDEZ vs. CHIOS SHIPPING CO., LTD. (Docket #75-7465, decided September 16, 1976). This was a case in which a party blocked discovery

and failed to present evidence available to it. The Court in its opinion stated as follows:

"This Court has previously noted that, particularly in admiralty suits, the 'non-production of material evidence which is in the control of a party raises an inference that the evidence is unfavorable to that party.... The inference raised has been said to be sufficient to decide a close case.' Tupman Thurlow Co., Inc. v. S.S. CAP CASTILLO, 490 F.2d. 302, 303 (2d Cir. 1974). The shipper here offered no evidence in rebuttal to show any testing or examination of the pallets prior to use. While non-production alone may not be the determinative factor, Hellenic Lines Ltd. v. Life Ins. Corp. of India, 526 F.2d 830, 832 (2d Cir. 1975), here, in addition to the Shipper's failure to reveal any measures taken to discharge his affirmative duty to inspect and its failure to provide a unit like that which caused the injury, the evidence detailed above supported a finding of a defect in the materials used in the construction of the pallet. The jury thus was entitled to conclude that the additional information in the possession of the Shipper would have been unfavorable to it."

Todd closed the openings from the engine room to the adjacent hold on or before October 15, 1971. It knew that they were closed. It also knew that they moved objects into and out of the engine room in December 1971 yet stated that it had not moved any. When ordered to do so it filed an amended answer to admit that objects had been moved into and out of the engine room but alleged that they were not moved through the elevator shaft. This was false and Todd

must have known that it was false. Todd's employees whom Lykes called first denied knowledge of having worked on the NANCY LYKES but after these witnesses were confronted with prior inconsistent statements showing knowledge and stating that objects were moved into and out of the engine room through the elevator shaft, Todd admitted that it had done so and that the access openings from the engine room to the adjacent hold had been closed on or before October 15th.

After Lykes had taken the testimony of Welsh, a Todd employee, as to the manner in which these objects were moved into and out of the engine room, Todd failed to call any fact witnesses or call the signalman whose job it was to watch the movement of the loads moving up and down the shaft. It made no effort to rebut the inference that the manifold swung and struck the cables causing the damage.

Under the cases cited in Lykes' main brief there is a compelling inference that one of the manifolds either when being moved into or out of the engine room struck and damaged the cables. There is no evidence of any kind to support the

the finding that the cables were damaged in any incident on December 10, 1971. Thompson found nothing that in the operation of the elevator could have caused the damage. There was nothing except the manifolds and other lifts by the gantry which could have delivered a horizontal blow to the cables.

Point III

THE DOCUMENTS ATTACHED TO THE APPELLEE'S BRIEF MARKED "SPECIAL EXHIBIT 1" and "SPECIAL EXHIBIT 2" ARE NOT EXHIBITS AND CONTAIN MISLEADING AND ERRONEOUS INFORMATION.

Attached to the Appellee's brief are two documents labeled "Special Exhibit 1" and "Special Exhibit 2". These form the subject matter of a motion by the Appellant in this Court to strike on the basis that these two exhibits were not offered in the course of the trial, were not admitted into evidence, are not a part of the record on appeal and are not included in the Appendix. To this we would add that the author of these two exhibits has not been identified nor has the source of his information been disclosed. These exhibits are submitted in support of the Appellee's theory of the cause of the damage to the cables. We have

shown at an earlier page of this brief that the theory is contradicted by the objective fact, viz., under the Appellee's theory the cables would have been severed at a distance of less than 7 feet from the bitter end whereas in actuality the cables were severed at a distance of greater than 16 feet. Appellee's theory is baseless. Accordingly these "Exhibits" should not be considered by the Court for they only add confusion since they are in disagreement with the facts developed at the trial and the testimony presented.

Conclusion

Todd takes the position that the damage to the cables occurred when Imanuel and Haag were operating the elevator on December 10th. There is no evidence to support this claim. The only possible cause of damage is that the manifold when being moved into or out of the engine room delivered a crushing blow to both cables. This is clear because the blow had to be a horizontal one and occurred

to both cables at the same time. Only the manifold could have done it.

Respectfully submitted,

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Reply Brief

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